United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

Affidavit

76-2006

To be argued by
PETER C. SALERNO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2006

UNITED STATES OF AMERICA *ex rel.*
BIRCHEL LEONARD CARSON,
Petitioner-Appellee,

—v.—

LARRY TAYLOR, Warden, Metropolitan Correctional Center, and JOHN T. CONNOLLY, Chief Probation Officer, Southern District of New York,
Respondents-Appellants.

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P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENTS-APPELLANTS

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BRIEF FOR RESPONDENTS-APPELLANTS

Preliminary Statement

This is an appeal by the Warden of the Metropolitan Correctional Center and the Chief Probation Officer for the Southern District of New York, both federal officials, from an order of the Honorable Marvin E. Frankel of the United States District Court for the Southern District of New York, filed November 14, 1975. Judge Frankel's order granted the petition of appellee Birchel Leonard Carson ("Carson") for a writ of habeas corpus on the ground that his mandatory release revocation hearing deprived him of due process of law. Judge Frankel's opinion is reported at 403 F. Supp. 747, and is reproduced in appellants' appendix at A. 4-28.*

* "A." refers to pages in the appendix.

Issue Presented

Did the process of revocation of Carson's mandatory release comply with the requirements of due process of law?

Statement of Facts

Carson was convicted in the Southern District of New York, on May 18, 1972, of interstate transportation of forged securities (18 U.S.C. §§ 371 and 2314) (A. 30, 42). On June 16, 1972 Judge Sylvester J. Ryan sentenced Carson to a prison term of five years (A. 30, 42). He was released pursuant to a Certificate of Mandatory Release on January 30, 1975 (A. 42), and thereafter was to be under supervision as if he were on parole, pursuant to 18 U.S.C. § 4164, until the expiration of the maximum term of his sentence less 180 days.*

By application dated July 1, 1975, the United States Board of Parole sought a parole violator warrant for Mr. Carson, on the ground that he had not submitted his supervision report for May 1975, had left his approved residence, and had not reported a change in address. His whereabouts were then unknown (A. 161). He was arrested July 3, 1975, in Biloxi, Mississippi, and on July 15 he was given a preliminary revocation hearing before Chief Probation Officer Gerald W. Brown (A. 43).

After the preliminary hearing, Carson was moved to New York. He arrived at the Metropolitan Correc-

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* For the purposes of this case the rights and obligations of a parolee and a mandatory releasee are the same. For convenience, since most of the applicable law has developed in the parole context, we shall refer to parole throughout this brief.

tional Center on about August 15 (A. 43, 113), and was given his final revocation hearing on September 24 (A. 36).

Some parole revocation hearings were conducted in New York on August 27, 1975, after Carson had arrived in New York, without Carson's hearing being scheduled for that time (A. 113). This was due to late notification by the United States Marshal, and a desire to give Carson sufficient time to prepare, secure counsel, and secure the attendance of witnesses (see the affidavit of Curtis C. Crawford, Director, Northeast Region, United States Board of Parole (A. 113-14)).

After his arrival in New York in August and before his hearing, on September 8, 1975, Carson filed his initial petition in this action (A. 30-31). By memorandum endorsement on an order to show cause submitted with the petition, Judge Frankel noted that the principal ground of Carson's claim was the delay in holding a hearing, and that the hearing was then scheduled (A. 32). By implication, Judge Frankel denied the writ with leave to renew it.

The Hearing

Carson's parole revocation hearing, before two hearing examiners, was held September 24, 1975 (A. 36). The entire transcript of it is reproduced at pages 61-97 of the appendix. At that hearing Carson was represented by retained counsel (A. 61).

At the beginning of the hearing, Carson was advised of his rights to counsel and to present witnesses, and he availed himself of both rights (A. 62). He agreed that he had written notice of the charges, in the form of the warrant application (A. 62, 161), and that he had had adequate time to prepare and to confer with his attorney (A. 62). He was warned that if he admitted to any

acts not charged that constituted violations of parole, the Board could take that into consideration (A. 63). Carson admitted that at the time of his release from prison on January 30, 1975, he had read and understood the conditions of mandatory release, which are the same as standard parole provisions (A. 63-64).

One of the hearing examiners then read the charges to Carson (failure to submit a report and failure to report a change in address), and Carson denied them (A. 65). These charges, and the evidence to support them, were detailed in a letter from Carson's parole officer, Roger H. Berger, requesting the violator warrant from the Parole Board (A. 65). Officer Berger was present at the revocation hearing, and testified. His letter, as read into the record, revealed that he did not receive Carson's report nor an answer to a follow-up letter. He visited Carson's last known address on June 23, 1975, and found that Carson was no longer there and had left no forwarding address (A. 65).

In his defense Carson claimed that he had sent Berger a letter, dated May 29, 1975, that constituted both a supervision report and a report of change of address (A. 65-66). Carson produced a photocopy of this letter at the hearing and read it into the record (A. 66-67). He apparently had not received the usual form for reports because it was mailed to him under a name he had previously used (A. 91). He also testified that he had attempted to reach Berger by telephone and had left messages (A. 69). Berger testified that he had never received Carson's letter nor any telephone messages (A. 67, 69).

Regardless, Carson admitted that he had not received specific permission from his parole officer to go to Biloxi, Mississippi, where he was arrested (A. 69-70). He also admitted that he had been to Canada while on

parole, without permission (A. 74-75). He claimed, in effect, that because he had previously received specific permission to travel outside the Southern District of New York on several occasions, he assumed that it was all right for him to leave the district without such permission (A. 70, 72).

Berger testified, however, that not only had he not given Carson blanket permission to travel anywhere (A. 72-73), but he had specifically told Carson that his travels were restricted to a 75-mile radius from New York City unless he received written permission from the Parole Board (A. 73, 79). Carson admitted that on all but the trips to Canada and Biloxi he had requested and received specific permission (A. 74-75). Also he admitted that "with regard to the letter of parole stipulations I should no doubt [have] had written permission" (A. 75). Significantly, with regard to the trip to Canada he did not contend, as he had with respect to Biloxi, that he had even tried to inform his parole officer of it.

Judge Frankel found that there was ample evidence in the record to support the Parole Board's finding that Carson had committed the violations charged in the warrant application, *i.e.*, failure to submit a report and failure to report a change in address, as well as the violations that emerged at the hearing of leaving the district without permission (A. 12; 403 F. Supp. at 751).

After discussion of the circumstances surrounding Carson's arrest in Mississippi (A. 75-80), the hearing turned to the subject of Carson's activities while on parole apart from the violations charged. As we will show in the argument portion of this brief, this inquiry was pertinent and important in determining what sanctions to impose should Carson be found to have violated his parole.

Carson was asked about these activities in detail. Some of the questioning was directed toward mitigating material, and some of it was directed toward harmful material. Thus Carson testified to attending courses at Columbia University while in custody at the Community Treatment Center prior to his release (A. 81); to his efforts then and thereafter to earn a living booking bands and running dances (A. 81-82); and to his future plans to operate a discotheque in Biloxi (A. 83-84). Much of this material was corroborated, and Carson's character attested to, by the testimony of James P. Gill, who was called in Carson's behalf (A. 76-77, 93-95).

On the negative side, Berger testified to, or Carson was asked about, various allegations contained in documents in his file indicating that he may have committed crimes and other undesirable acts while on parole. The allegations were described to Carson at the hearing in considerable detail (A. 84, 86, 88, 89). While the documents themselves were not shown to Carson or his counsel, neither made any demand for their inspection or further particularization of their contents. Rather, Carson's counsel objected to the inquiries on the grounds of relevance or the unresponsiveness of Berger's statements (A. 74, 88, 89).

In connection with these allegations, Carson was asked about a report that he had drawn a check on insufficient funds, payable to his friend Mr. Gill, who was present at the hearing. Carson explained that he had made good on that check, and that the overdraft was an error (A. 84-86). He was asked about a bill he allegedly owed to a hotel in Canada (A. 86, 88); he claimed that he thought he had paid it, and that he had never heard from them (A. 86). He was asked about a payment he had made to a lawyer in Massachusetts named Herisko, with a $500 check that turned out to be stolen; Carson impliedly denied that he knew it was stolen, and stated

that he had satisfied the lawyer by assigning a portion of a tort claim to him (A. 89-90). Parole Officer Berger also stated that a postal inspector had questioned him concerning an investigation of Carson's involvement with some stolen money orders (A. 89), to which Carson made no response.

Carson's counsel cross-examined Berger (A. 91-93), and presented the testimony of Mr. Gill regarding Carson's character and the availability of legitimate employment for him in Biloxi (A. 93-95). In his summation, counsel did not assert that Carson had not violated his parole, but rather that he had been punished enough by the amount of time he had been incarcerated and that, if he were released, he should be allowed to go to Mississippi where he had a prospect of employment rather than be made to stay in New York (A. 95).

At the close of the hearing, the hearing examiners recessed, and returned with a tentative oral decision that Carson had committed the parole violations originally charged, as well as that he had left the district without permission, and that he should continue serving his sentence until its expiration, for the following reason:

> "[W]e feel your release at this time would depreciate the seriousness of your mandatory release and promote disrespect for the mandatory release process and we do not think there is a reasonable probability at this time that you would [conform to the *] conditions of your mandatory release." (A. 97).

This decision was followed, on October 7, 1975, with the official decision of the Board of Parole, which reads:

> "Your release at this time would depreciate the seriousness of your mandatory release process. It

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* There is a gap in the transcript here. The words in brackets appear to be what is meant.

> does not appear to be a reasonable probability at this time that you would conform to the conditions of mandatory release in that you failed to submit your supervision report for the month of May, 1975, failed to report change in residence to your parole officer and admitted to the panel that you left the district without permission" (A. 54).

Certain documents in Carson's parole file were not made available to Carson or his counsel for physical inspection. However, the substance of the only documents that were "used" against Carson in any sense was disclosed at the hearing. As already noted, no demand was made for further particularization and Carson responded to the allegations.

The evidence of the "use" made of these documents, apart from their use in questioning Carson at the hearing, is in the official decision of the Parole Board (A. 54, quoted *supra*), and in the "Hearing Summary"* prepared after the hearing.

The official decision of the Parole Board does not contain any reference at all to any documents. Rather, the decision to continue Carson to the expiration of his sentence was based entirely upon his demonstrated failures to comply with the conditions of mandatory release, and the

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* This document was submitted to the District Court *in camera* together with other documents including the "secret" material relating to Carson's activities while on parole. These materials are contained in a sealed package marked "Court Exhibit 2," which was returned to the United States Attorney's office by the District Court after its decision in this case. The package is of course available to this Court upon request. The "Hearing Summary," while not given to Carson while he was *pro se*, is being furnished to appointed counsel on this appeal along with this brief and copies will be handed to the Court at oral argument. The documents in that package that have never been disclosed to Carson consist of intra-agency memoranda of various kinds.

prediction, based upon those violations, that he would not comply in the future.

The Hearing Summary discusses Carson's alleged nefarious activities solely under the heading "Information on Parolle [*sic*] Standing as a Good Parole Risk—Community Resources." The Summary discusses, completely accurately, the testimony that was adduced at the hearing on these points, including Carson's denials. The Summary then states:

> "There is some mention in the record that he was involved in defrauding an Inn keeper while in Canada and some hint that prosecution might be pending. However on [*sic*] this instance and the two previous instances of suspected bad checks there is not [*sic*] prosecution pending as far as it could be determined it does indicate however to the panel that there is some question about subject's overall behavior while under supervision.
>
> VI. EVALUATION REVIEW
>
> The panel feels that subject has violated the conditions of his mandatory release sufficiently to warrant revocation. It also believes that in the main subject has not done well under supervision has [*sic*] perhaps skirted the regulations in more ways than are alleged and that there is a good possibility that he has been involved in [space in original] if not direct criminal misbehavior. There is however nothing definite that can be said in term [*sic*] of proof but it does give the panel some pause in deciding whether or not subject should be released into the community at this time."

It is clear that the Board considered Carson's proven parole violations sufficient to revoke his mandatory release, and that it was aware that no other wrongdoing

had been definitely proved. Furthermore there is no evidence, in the foregoing passage or elsewhere, of reference to any accusations or documents whose substance was not disclosed to Carson at the hearing.

The day after the hearing, and prior to receiving the Board's final decision, Carson wrote a letter to Judge Frankel complaining that the hearing had been unfair and had violated his constitutional rights in numerous ways (A. 36-38). He desired that letter to be treated as an amended petition for a writ of habeas corpus (A. 37), and Judge Frankel directed the Government to respond to it (A. 39-41).

In his decision of November 14, 1975, Judge Frankel ordered Carson released on the ground that he was deprived of his liberty without due process of law in the parole revocation proceedings just described.* The specific bases for this decision will be discussed in detail, and rebutted, in the argument portion of this brief.

Carson was released from custody on November 19, 1975. The Government filed its notice of appeal in this action on January 7, 1976 (A. 162).

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* While Judge Frankel did not state that the Board could not cure all the defects he found by holding a new hearing, presumably the Board was free to do so, and is free to do so even if this Court affirms his decision.

ARGUMENT

The Revocation of Carson's Mandatory Release Complied With Due Process Requirements.

Carson received a parole revocation hearing before two hearing examiners, prior to which he received written notice of the parole violations with which he was charged. At the hearing he was represented by counsel. His parole officer's testimony, indisputably sufficient to establish that Carson had committed the violations charged, was subject to cross-examination. After the hearing, the Parole Board issued a decision showing that Carson's mandatory release was being revoked because, based upon the proven violations, the Board did not feel that Carson could conform to parole restrictions. This decision was within the Board's discretion. Carson received the full panoply of protections to which he was entitled.

The due process requirements of parole revocation proceedings were set forth by the Supreme Court in *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). That case involved two state prisoners who, at least as appeared from the record then before the Court, *id.* at 476-77, had had their paroles revoked without any hearing at all. *Id.* at 474-75.

The Court held that "the requirements of due process in general apply to parole revocations," *id.* at 481, since a parolee's loss of even his "indeterminate" liberty is a "grievous loss." *Id.* at 482.

The Court then stated, as to the "nature of the process that is due," *id.* at 484, that a parolee faced with revocation was entitled to a preliminary hearing "to determine whether there is probable cause to believe he has committed a parole violation," *id.* at 487, and to a second hearing "prior to the final decision on revocation." *Id.*

The purpose of the revocation hearing itself is to arrive at

> "a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation."

408 U.S. at 488.

The Court then stated what it considered to be

> "the minimum requirements of due process. They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finders as to the evidence relied on and reasons for revoking parole."

Id. at 488-89.

It is clear from the Court's opinion in *Morrissey* that the decision to revoke parole is discretionary, provided that it is based upon accurate and complete facts, and that the procedural requirements described have been observed. *Id.* at 480-84. As the Court said:

> "The first step in a revocation decision thus involves a wholly retrospective factual question:

> whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation? The first step is relatively simple; the second is more complex. The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts. This part of the decision, too, depends on facts, and therefore it is important for the board to know not only that some violation was committed but also to know accurately how many and how serious the violations were. Yet this second step, deciding what to do about the violation once it is identified, is not purely factual but also predictive and discretionary."

Id. at 479-80.

The standard of review in the district court of parole board determinations is set forth in this Court's pre-*Morrissey* decision in *United States ex rel. DeFillo* v. *Fitzpatrick*, 378 F.2d 85 (2d Cir. 1967):

> "[T]he test is not whether there was substantial evidence to support the Board's decision revoking his release but whether, as a matter of law, the revocation on its face appears to be without any support .... If the process requirements of the statute have been observed, and there has been a violation of parole, 'the effect of its [Board's] action of revocation cannot be touched' and the defendant is not entitled to release from such custody through a writ of habeas corpus."

378 F.2d at 87-88 (citations omitted; brackets in original).

Judge Frankel did not purport to review the Parole Board's discretionary decision to revoke Carson's parole once a violation was properly found. His opinion is a wide-ranging critique of the procedures that attended the revocation decision. His holding appears to be that, whether or not any one alleged impropriety required Carson's release, the cumulation of many such alleged improprieties did (A. 12-13; 403 F. Supp. at 751). In chronological order, Judge Frankel identified the improprieties as follows:

1. The delay between Carson's arrest and his hearing (A. 13; 403 F. Supp. at 751);

2. The Board's alleged reliance on "undisclosed evidence" (A. 16; 403 F. Supp. at 753), allegedly in violation of both due process and the Board's regulations (A. 17-18; 403 F. Supp. at 753);

3. An "[in]tolerable level of disorder" at the revocation hearing (A. 18-23; 403 F. Supp. at 754-56);

4. An inadequate statement of the reasons for imposing the punishment of reimprisonment (A. 23-24; 403 F. Supp. at 756).

The Government strongly contends that the Parole Board's actions were not deficient in any of these areas, that the District Court's displeasure with and criticism of the conduct of the hearing were ill-founded and that they were not a proper basis for granting a writ of habeas corpus. We shall discuss each criticism *seriatim*.

A. The Delayed Hearing

The short answer to any suggestion that the delay between Carson's arrest on July 3, 1975 and his revocation hearing on September 24 justifies his release is the clear law of this Circuit that a fair hearing cures any delay, absent prejudice. *United States ex rel. Blassin-*

game v. *Gengler*, 502 F.2d 1388 (2d Cir. 1974) (post-*Morrissey*); *United States ex rel. Buono* v. *Kenton*, 287 F.2d 534, 536 (2d Cir.), *cert. denied*, 368 U.S. 846 (1961). Judge Frankel implicitly recognized this (A. 15-16; 403 F. Supp. at 752). In this case, there was no claim, showing, or finding of prejudice (*e.g.*, that witnesses lost their memory or became unavailable during the period of delay). Therefore, the delay of 84 days between Carson's arrest and his hearing is no basis for his release.

We would like to rebut, however, Judge Frankel's finding that this delay was unreasonable (A. 15; 403 F. Supp. at 752). Significantly, the Supreme Court in *Morrissey* stated that a lapse of two months between arrest and hearing would not be unreasonable. 408 U.S. at 488. It must be recalled that a substantial portion of the delay in this case, from July 3 to August 15, was caused by Carson's being in Biloxi, Mississippi, where he had no right to be. He was well outside the limitations imposed by his parole officer and he had no permission to be there (A. 65-73; see pp. 4-5 *supra*).

The Board had every right to hold Carson's final hearing in New York. Unlike the situation where revocation is sought based on the commission of another crime, in this case the only witness of the violations charged was Carson's parole officer, who was located in New York. *Morrissey* does not require that the Government transport its sole witnesses to wherever a parolee has improperly taken himself, rather than transport the parolee through the prison system back to the district in which he belongs.*

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* Carson received a preliminary hearing in Biloxi, at which he was represented by counsel (A. 43). The purpose of such a hearing, under *Morrissey*, "is to determine whether there is probable cause to believe [that the parolee] has committed a

[Footnote continued on following page]

The delay between Carson's arrival in New York and his hearing is of course due to the Government rather than Carson. Hearings were scheduled in New York on August 27, after Carson had arrived there, and Carson's case was not heard until September 24. However, there is no apparent basis for Judge Frankel's statement that the Parole Board's explanation, that the delay was due to late notification to the Board by the United States Marshal and a desire to allow Carson time to prepare (A. 113-14), was not candid (A. 14; 403 F. Supp. at 752).

B. The "Undisclosed" Documents

As we have already noted, *supra* p. 6, Carson was questioned at his hearing about certain allegations of wrongdoing contained in his parole file. There is no support in the record, however, for Judge Frankel's contention that these documents were used to find that Carson had violated his parole conditions (A. 9; 403 F. Supp. at 751). They did not relate at all to the two violations originally charged, both of which were proved by the live testimony of officer Berger, and Carson admitted the third violation found (A. 74-75).

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parole violation." 408 U.S. at 487. No claim is apparently made in this case that probable cause was not established. *Morrissey* also states that, at the parolee's request, adverse witnesses are to be made available at the preliminary hearing. *Id.* There is no indication that Carson asked for his parole officer to be present at that hearing (though he did ask that his *final* hearing take place in Biloxi, and that Berger be present for it). *Morrissey* should not be taken to mean, however, that Berger should have been produced at the *preliminary* hearing, in Mississippi, had Carson requested it. The thrust of the preliminary hearing requirement is that it be conducted near the place of *violation*, and promptly so that information is fresh. In this case, because the violation did not involve another crime, the chance of the adverse evidence going stale would seem limited. And since that information was in New York, the *preliminary* hearing could, and perhaps should, have taken place in New York.

Contrary to Carson's repeated assertions (*e.g.*, A. 36-37), inquiry beyond the parole violations originally charged was pertinent to the dispositional aspects of the revocation proceeding. *Morrissey* v. *Brewer*, 408 U.S. at 480 (In the dispositional phase "it is important for the board to know not only that some violation was committed but also to know accurately how many and how serious the violations were"); *Latta* v. *Fitzharris*, 521 F.2d 246, 252 (9th Cir. 1975) ("In making this decision regarding disposition, the parole authorities need to know the number and seriousness of all violations, as well as other current information about the parolee's progress"; case upholds warrantless search of parolee's house by parole officer, based upon his interest in obtaining accurate information); *United States* v. *Winsett*, 518 F.2d 51, 55 (9th Cir. 1975) ("Because violation of probation conditions may indicate that the probationer is not ready or is incapable of rehabilitation by integration into society, it is extremely important that *all reliable* evidence shedding light on the probationer's conduct be available during probation revocation proceedings." Footnote states that hearsay and other reliable evidence is admissible on this point).

The manner in which this inquiry occurred did not violate Carson's rights. The substance of the allegations was accurately stated to Carson (A. 84, 86, 88, 89), and he gave his explanation. Such disclosure by reading was permitted by the applicable regulation, 28 C.F.R. § 2.56 (e). Judge Frankel's statement that the summary was not meaningful (A. 28; 403 F. Supp. at 753-54 n.4) is unexplained and inexplicable, and Carson's own rebuttals belie any finding that he could not respond meaningfully.

Thus the due process requirement, and the regulatory requirement, cited by Judge Frankel, that "All evidence upon which the finding of violation may be based shall be disclosed," 28 C.F.R. § 2.56(e), was complied with.

Judge Frankel misinterpreted the regulations regarding live testimony. His opinion states (A. 17; 403 F. Supp. at 753) that the Board is required by 28 C.F.R. § 2.56(d) to "request the attendance of persons who have given statements upon which revocations may be based . . ." The regulation states that this applies only when the alleged violator "does not admit violation of any of the conditions of his release." The requirement thus applies only to the initial finding of violation, not to the dispositional phase of a revocation proceeding.

Nor does due process require that every fact about a parolee's behavior in the community that might surface in a revocation proceeding be supported by evidence that would be admissible in a criminal trial, let alone by live testimony. *Morrissey* is explicit on this point: "[T]he process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." 408 U.S. at 489. Similarly, in *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782-83 n.5 (1973), the Court noted that

> "While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence."

As the Court noted in *Gagnon*, this problem arises in particular where witnesses are far away, as they were in the cases about which Carson was questioned at his revocation hearing.

Thus the Board's use of documentary evidence at the hearing was proper. Its substance was disclosed, without demand for further particularization, and Carson was able to respond. Since, according to *Morrissey* and *Gagnon*, this documentary evidence was admissible,

the Board could properly find, as it did in the "Hearing Summary," that there was "some question" as to Carson's behavior on parole. The Board did not have to accept Carson's denials at face value.

Judge Frankel accurately notes (A. 28, 403 F. Supp. at 753-54 n.4) that some material, not identified, was not disclosed to Carson at all. This is presumably a reference to other documents contained in Court Exhibit 2. Those documents include many miscellaneous Parole Board documents having no evidentiary bearing on the revocation proceeding, many of which were evidently signed by Carson or disclosed to him in other contexts; intra-agency communications between various Parole Board employees, including officer Berger, concerning Carson's case; and the "Hearing Summary," which of course did not exist at the time of the hearing.

There is no evidence in the record that any of these documents were used against Carson. The only references in the Hearing Summary are to those matters about which Carson was directly questioned. The Board recognized that, as a result of Carson's denials, there was no proof that he had committed any of the acts alleged. The Board, at worst, felt that there was "some question about [Carson's] behavior while under supervision" (see p. 9 *supra*). The propriety of this procedure has already been discussed.

Judge Frankel's opinion states, "It was conceded at oral argument, and it is clear from the record before us in any event, that the hearing examiners relied upon undisclosed evidence in deciding that petitioner's parole should be invoked [*sic*]." (A. 16; "revoked" in 403 F. Supp. at 753). The Government's oral argument on this point is at A. 134-41, and it is clear that the Government's contention was the same as it is here, that Carson was questioned about allegations contained in

documents (A. 135). Judge Frankel declined the Government's offer of live testimony that would have confirmed or elucidated the point (A. 136). This is the only "concession" made in oral argument concerning the use of these documents, and the foregoing discussion makes it clear that the record justifies no broader inference.

C. The Disorderliness of the Hearing

A portion of the District Court's opinion in this case consists of a diatribe against what the Court saw as an "[in]tolerable level of disorder" (A. 18; 403 F. Supp. at 754). This finding is based upon a complete mischaracterization of the proceedings. Regardless, no authority is cited, nor are we aware of any, for the proposition that a rambling revocation hearing denies due process.

The principal objection voiced by Judge Frankel was that officer Berger was permitted to make numerous unresponsive statements, and that "the hearing officer in charge allowed much of the hearing to range far beyond the two alleged violations and into scraps of rumor, third- or fourth-hand allegations, and sinister hints all designed to suggest, without remotely proving, that petitioner was roaming about the country misbehaving and seducing others into misbehavior" (A. 19; 403 F. Supp. at 754).

In the first place, once again there is no evidence that the hearing examiners or the Parole Board relied on any such testimony in revoking Carson's parole. In reviewing a district court's decision after a trial without a jury, even where improper evidence has been put before the judge, "it will be presumed, absent a clear showing to the contrary, that the Trial Court relied only on proper

evidence in reaching its conclusion." *United States* v. *396 Corp.*, 264 F.2d 704, 709 (2d Cir.), *cert. denied*, 361 U.S. 817 (1959) *quoting Ferguson* v. *Post*, 243 F.2d 144, 145 (2d Cir. 1957). The same presumption should apply here, and it is amply supported by the record.

Judge Frankel appears to have felt that Carson's counsel was justified in objecting on relevancy grounds to inquiry into Carson's actions in Canada and Massachusetts (A. 21; 403 F. Supp. at 755). We have already shown that that inquiry was proper, *supra*, p. 17. The Parole Board drew no erroneous conclusions from officer Berger's testimony—on the contrary it recognized, accurately, that no charges had been proved and that Carson had denied any wrongdoing. See pp. 9, 19 *supra*.

Careful perusal of the entire hearing transcript (A. 61-97) reveals that the hearing examiners were neutral, fair, and anxious only to get as complete a picture of Carson's case as possible. Carson and his witness were given a full opportunity to make any statements they wanted to make, and Carson's counsel had a full opportunity to cross-examine Carson's parole officer. The conduct of the hearing cannot reasonably be characterized as a denial of due process of law.

D. The Inadequate Statement of Reasons

Judge Frankel also erred in his final finding, that Carson was given an inadequate statement of the reasons for imposing the penalty of incarceration for his violations. Judge Frankel so ruled on the ground that "formal agency jargon" was inadequate (A. 23-24); 403 F. Supp. at 756).

As we have already noted, the Parole Board's decision (A. 54) unambiguously states that Carson's sentence was to be continued to its expiration because, based

upon the three clearly proven parole violations, the Board did not feel that Carson could comply with the conditions of mandatory release. *Supra* pp. 7-8. We are at a loss to see what more could or must have been said.

The adequacy of the reason given Carson is supported by this Court's decision in *United States ex rel. Johnson* v. *Chairman of the New York State Board of Parole*, 500 F.2d 925 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974). This Court held that a prisoner is entitled to the same due process in a decision to grant or deny parole as a parolee is in the decision to revoke it, 500 F.2d at 928, and that due process required a statement of the reasons for denial. Concerning the minimum requirements of an adequate statement of reasons, this Court said:

> "To satisfy minimum due process requirements a statement of reasons should be sufficient to enable a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all. For this essential purpose, detailed findings of fact are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnished to the inmate both the grounds for the decision (e.g., that in its view the prisoner would, if released, probably engage in criminal activity) and the essential facts upon which the Board's inferences are based (e.g., the prisoner's long record, prior experience on parole, lack of a parole plan, lack of employment skills or of prospective employment and housing, and his drug addiction)."

Id. at 934. See also *Haymes* v. *Regan*, 525 F.2d 540, 544 (2d Cir. 1975).

The decision in Carson's case plainly comported with the above criteria—he was told that in the Board's view

he probably would not comply with parole conditions, based upon proven violations of those conditions while he was out on parole.*

Carson was afforded due process of law in every respect in the course of the United States Board of Parole's decision to revoke his mandatory release. Judge Frankel's opinion to the contrary is erroneous.

CONCLUSION

The order of the District Court granting appellee's petition for a writ of habeas corpus should be reversed.

New York, New York
April, 1976

Respectfully submitted,

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* Any finding that Carson was inadequately informed of the reasons for the revocation decision could presumably be cured by furnishing a fuller statement, rather than by ordering the parolee's release.

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Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 76-2006

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 2nd day of ~~March~~ April, 19 76 she served ~~a~~ copys of the within govt's brief and the appendix

by placing the same in a properly postpaid franked envelope addressed:

Birchel Leonard Carson,
c/o The Coffee Grainder,
Edgewater Plaza,
Biloxi, Mississippi 39531

And deponent further says she sealed the said envelope and placed the same in the mail ~~chute~~ drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this
2nd day of ~~March~~ April, 19 76

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977